

1 filing of the original plan, which was filed on
2 February 18th of 2010. And that provides that the
3 action against WestLB would be dismissed with
4 prejudice if the committee did not object to the
5 plan. So parties looking at this, Park City I would
6 have known and should have known that nothing could
7 be expected from the litigation if the committee was
8 satisfied before the original plan was filed.

9 The committee supported the original plan.
10 The committee supported this plan. That is no change
11 for the expectations of Park City and the other
12 ultimate equity plan holders since the first plan was
13 filed.

14 In addition, your Honor, this is
15 completely appropriate of the committee because the
16 status of that action is such that WestLB has never
17 filed an answer. And as your Honor knows, under Rule
18 7041(a), the plaintiff can dismiss without even a
19 court order as long as no responsive pleading had
20 been filed. So that's been out there. It was
21 appropriately out is there.

22 Third, there is no claim unless the equity
23 and capital structure above the debtor at Mezzanine
24 and Holding are satisfied. And as the Court has
25 heard, the -- with the claim of Bay North in excess

1 of 11 million -- maybe up to 44 million, as was
2 discussed today -- it is not reasonable that any
3 distribution should be expected at that level.

4 And the fourth thing is the evidence
5 supporting the 9019 settlement with WestLB has been
6 presented un rebutted, and it shows the standards, the
7 Copexa standards have been met. It -- those
8 standards were gone by -- clearly, in the testimony
9 of Mr. Elliott, this is in the best interest of the
10 creditors as demonstrated by the evidence and the
11 committees' support of this -- this settlement.

12 There is -- there was no objection when
13 the original release was given to WestLB under the
14 cash collateral order eight months ago. There was no
15 objection by these ultimate equity holders when the
16 committee was given standing to look into and pursue
17 any causes against WestLB, and there is no evidence
18 to support that the committee did not exercise
19 reasonably their review and consideration of Copexa
20 standards in settling this case.

21 And as a practical matter, it comes down
22 to the fact that if you look at the settlement,
23 WestLB is paying four and a half million dollars in
24 new money. It's compromising its claim for less than
25 the full amount of its claim, and it's allowing

1 unsecured creditors, if they are paid over time, to
2 be paid a hundred cents on the dollar before they are
3 paid. It is just very clear that the 9019 standard
4 has been met.

5 Dealing then with the issue of the third
6 party releases, I think the other objections raised
7 by Park City have been adequately addressed by
8 Mr. Blumenthal in his arguments, but just touching on
9 the third-party releases, they raised the specter of
10 third-party releases, but there are no third-party
11 releases in this plan. If you look at the Western
12 Real Estate Fund case, the Tenth Circuit case, which,
13 you know, prescribes third-party releases, this does
14 not fit under that situation. That prescribes
15 releases required involuntarily through the plan, and
16 those would be releases by somebody other than the
17 debtor, of a party other than the debtor and that is
18 not occurring here. If you go through the releases,
19 Section 11.2 is a release by the debtor only with
20 respect to defined claims. It is not a third-party
21 release. Section 11.3 is an exculpation clause which
22 mirrors 1125, which is completely appropriate.
23 Section 11.4 is a release of WestLB as part of the
24 compromise supported under Rule 9019, and it is only
25 from estate causes of action. It is entirely

1 appropriate. And as I stated, the evidence
2 supporting it is unrebutted.

3 Then Section 11.5 is the injunction, and
4 this mirrors 524. Again, completely appropriate and
5 allowed under the code. And, in fact, to be even
6 more careful, that section says that that injunction
7 is only allowed to the fullest extent authorized or
8 provided by the bankruptcy code. So clearly nothing
9 that is not allowed by the bankruptcy code, you know,
10 is included in this plan.

11 And based on these arguments, on the
12 evidence presented, and on the fact that this party
13 has no standing, we would ask the Court to overrule
14 those objections.

15 THE COURT: Thank you.

16 Mr. Jenkins?

17
18 CLOSING ARGUMENT

19 BY MR. JENKINS:

20 Your Honor, just very briefly, and I will
21 not retread the ground Ms. Jarvis tread already with
22 respect to the settlement. I just wanted to make a
23 concluding comment that with respect to the response
24 that the committee filed, that as we put on the
25 record earlier, there has been a resolution of that

1 issue reached, and that re-electing or
2 reconsideration of certain Class 4 creditors will be
3 allowed and the terms that were stated, that
4 Mr. Havel stated are acceptable to the committee.

5 There was one matter that we raised in our
6 pleading that we filed last Thursday which was not
7 addressed today, and that was our second point, which
8 indicated that we believe that the debtor should
9 have -- or WestLB should have to increase the amount
10 of its allocable cash to make payments to Class 4
11 unsecured creditors who elect on the effective
12 date -- to take the effective date payment. The
13 resolution we reached on the voting issue or the
14 re-electing issue has resolved that and mooted that
15 issue, that the economics of the plan remain the same
16 as currently stated in the plan supplement.

17 And just as a final matter, with respect
18 to the settlement that Ms. Jarvis touched on, this is
19 a settlement that is embodied in a plan under Section
20 1123(b)(3), which does provide that a plan can
21 compromise or adjust claims held by the debtor or by
22 the estate. Whether or not the Copexa standard
23 applies to such settlements when they are embodied in
24 a plan was something that the Court raised and,
25 frankly, something I was scratching my head over.

1 It, indeed, turns out based on a review of the case
2 law that the Copexa standard or something similar to
3 it is appropriately applied to a settlement even when
4 it's brought within a plan of reorganization, as
5 opposed to a separate 9019 settlement.

6 But looking at the standards, which are
7 very similar, the Court's charge is still the same,
8 and that is the Court doesn't need to determine the
9 issues. The Court doesn't need to try the issues.
10 What the Court needs to do or is charged to do is to
11 canvass the settlement and determine -- canvass the
12 issues and determine whether the settlement falls
13 above the lowest point in the range of
14 reasonableness. That is the standard and it's a
15 fairly flexible standard, of course. And I would
16 submit to your Honor that the settlement that we
17 proposed here in the plan where the litigation will
18 be dismissed in exchange for essentially full payment
19 to unsecured creditors if they so elect, or a
20 discounted payment on the effective date, certainly
21 falls well within and well above that lowest point of
22 the range of reasonableness.

23 As the undisputed testimony which was
24 proffered of Mr. Elliott showed, there was certainly
25 some uncertainty as to the likelihood of the success

1 in this. It's a complicated lawsuit, which would
2 have fact-intensive issues. The issues would
3 certainly be expensive to litigate. And as
4 Mr. Elliott's testimony indicated, WestLB is
5 represented by very aggressive and competent counsel
6 who no doubt would very vigorously defend the
7 lawsuit.

8 Finally, second -- or, I'm sorry -- on the
9 issue of the collectability of the judgment, while
10 that issue was not foremost in the committee's
11 consideration, certainly the collectability, with
12 WestLB being a bank and there really being no
13 affirmative claim for money damages, made that issue
14 certainly less prevalent, less dominant in the
15 consideration.

16 And finally, the settlement must take
17 account of the best interests of creditors, giving
18 due deference to their reasonable views. I would
19 submit in this case, in this situation, unlike a
20 typical 9019 settlement which is brought by the
21 trustee or a debtor where the creditors are being
22 asked to express their views, in this situation, the
23 creditors have, indeed, expressed their views and as
24 the creditors that have entered into the settlement
25 and fully support that settlement.

1 And on that basis, your Honor, we would
2 ask the Court to approve the settlement as it's
3 embodied in the plan and confirm this plan. Thank
4 you, your Honor.

5 THE COURT: Thank you.

6 Mr. Wilson?

7
8 CLOSING ARGUMENT

9 BY MR. WILSON:

10 Thank you, your Honor. Counsel have been
11 fair and concise and I'll try to do the same.

12 This objection, the objection of the
13 Wickline parties, centers really on a couple of
14 things and I'll focus there, but they reverberate
15 throughout the case and the matters that the Court is
16 required to consider as it considers confirmation of
17 a claim.

18 The -- it has become abundantly clear that
19 Mr. Wickline and Mr. Shoaf had a falling out as
20 business associates. I believe the parties have
21 understood generally that it's not this Court's
22 problem, and so we have not burdened the Court except
23 in a very general sense with the details or issues
24 relating to that. But the existence of that and some
25 of the conduct pertaining to that is relevant to this

1 confirmation proceeding and the plan that is before
2 the Court.

3 First of all, the evidence is that
4 Mr. Wickline's interests were -- in August of last
5 year, his interest in Management were through certain
6 corporate or entity actions. He was basically frozen
7 out of Management from that point on. But what that
8 means is that Mr. Shoaf, who stayed on and who
9 continued and continues to have managerial
10 responsibility for this debtor and other entities
11 within the organization, does not -- having effected
12 an expulsion, is not able to expel fiduciary duties
13 as he acts for the entities, and particularly the
14 debtor entity here. And there are issues relating to
15 the Management and Development claims that are here,
16 and I'll speak to those as briefly as I can. But
17 basically, it is apparent that Mr. Shoaf will not,
18 with confirmation of this plan, leave that all behind
19 but he remains on and has significant future
20 involvement with this debtor -- employment for a
21 period of two years at \$240,000 per year, the --
22 however, the unique term of that employment agreement
23 relates to the transfer of licenses. We submit that
24 it is mostly about the liquor licenses. There has
25 been some effort to obscure that with some other

1 licenses. But may I just call the Court's attention
2 on that issue to just a couple of things in the
3 employment agreement? And that is, there seems to be
4 a significant focus upon the liquor licenses
5 themselves and this is where I would like to focus
6 the Court. It's on Exhibit 2. It is the plan. It's
7 page 22. It's paragraph 7.2. I think it gives
8 proper perspective to the role of the liquor license
9 that's here. Paragraph 7.2, paragraph small b,
10 "Continuing use of liquor licenses on or after the
11 effective date, providing acceptable employment
12 agreements agreed upon and entered into between Shoaf
13 and the organized debtor," and "Shoaf and the
14 reorganized debtor will facilitate a transition under
15 which the reorganized debtor will have the ability to
16 use liquor licenses currently used in the debtor's
17 operations." There is no other reference to anything
18 else there with regard to other licenses.

19 The conduct of Mr. Shoaf with regard to
20 that -- and the evidence is this, that the
21 applications were made. Jointly, Mr. Wickline and
22 Mr. Shoaf were the responsible principals. The
23 documentary evidence related to one license, however,
24 the testimony related to that license, of which there
25 are several, relating to this, the testimony of

1 Mr. Shoaf, and so the documentary evidence is just
2 indicative of, I think, the situation with the other
3 licenses. And that is that Mr. Shoaf, through his
4 unilateral conduct in the renewal process, the
5 licenses were held by Management, and they are still
6 held by Management today. Those licenses have two
7 more days to go. But the Court will see on W-2 that
8 Mr. Shoaf lined out and acknowledged that he lined
9 out the entity that holds the licenses and
10 substituted not one that he owned and controlled only
11 half of, but he put in and substituted an entity
12 which he, himself, totally controls. Unilateral
13 conduct. Why did he do that? 240,000 big dollars is
14 why he did that because he has bargained for a handy
15 bonus if he can assure continuity and deliver those
16 licenses, and that required him to take unilateral
17 action to garner them all for his own name -- all in
18 his own name and under his control so that he can
19 effect whatever he needs to do to win this \$240,000.

20 A couple of things, he's going to stay on.
21 He's going to get 20 grand a month for two years.
22 That is pretty good pay, given his involvement with a
23 failed organization. If that is not enough and that
24 would be -- one would expect that in the performance
25 of those rather ordinary duties at that rather

1 unordinary compensation level that he would do
2 whatever he needed to do to protect the interests of
3 the entity, but what he is doing is, in addition to
4 that compensation is, he has taken steps to
5 unilaterally wrestle control of a significant asset.
6 And we all agree that you cannot sell liquor
7 licenses, except that here we are not selling them.
8 All we are doing is unilaterally exercising control
9 over them, and then we are not going to sell them; we
10 are going to market our services for a huge bonus to
11 deliver them, and of course it was negotiated with
12 his counsel and the debtors here.

13 But it's -- that alone, in addition to the
14 compensation of the other \$480,000 -- all told, a
15 package of \$720,000 that Mr. Shoaf gets as a reward
16 in this case is -- plus some perks, some additional
17 things that he gets based on some further sales and
18 so forth down the road -- is just really, amazingly
19 enough, about what he would get, should the
20 Development and Management claims have been paid in
21 full. Well, that is a fact and I think I'll not say
22 more other than this is how -- this is what plays
23 into the objection, and it goes to the other -- to
24 the other issues here. The plan must be submitted
25 and paid. The debtor is Partners. The manager of

1 debtor is Shoaf. This is what Shoaf did. This is
2 what the plan provides for Shoaf. Is that good
3 faith? We submit that it is not, under these
4 circumstances.

5 Let's turn just very quickly to the
6 Management and the Development claims. WestLB has
7 presented and we have not -- we have not objected to
8 admission, nor do we take issue with the existence of
9 the two subordination agreements. We appreciate
10 sometimes what hearings are all about is, especially
11 on these hurry-up ones, is you get to see what the
12 evidence is. They are there. They are probably
13 standard. Their terms are what they are. Wickline
14 submits, the Wickline interests submit, that the
15 subordination agreement is unenforceable for these
16 relatively easily articulated provisions, and I'll
17 just state that I think we've all read 510, and it
18 does make a specific reference to that in the
19 subordination agreements.

20 Here is why we submit that it is not
21 enforceable in this case, and it is a contract. And
22 it can only be enforced in accordance with ordinary
23 contract principles. Contracts are subject to
24 defense. Point one. When WestLB was a creditor, a
25 fellow creditor, Management and Development and

1 WestLB and Bay North were just creditors. They were
2 just plain old creditors, and their rights were
3 determined. This Court is called upon to determine
4 rights and priorities all day, every day. When
5 WestLB chose to become -- instead of filing its own
6 plan -- when it chose to become a plan proponent and
7 joined with this debtor as a co-plan proponent, it --
8 the character of its involvement changed, I'd submit,
9 from just a plain old creditor to a plan proponent,
10 and it joins in and shares the duties of the debtor
11 of submitting a plan in good faith.

12 And this plan with this treatment of
13 Mr. Shoaf and the honoring of him through this
14 \$720,000 compensation package, based on his conduct
15 to wrestle away, in contrary to his fiduciary duties,
16 the assets of Management, like it or not, WestLB
17 becomes a partner with the debtor and shares good
18 faith in there, and we submit there is not good faith
19 in that regard.

20 And we have submitted further arguments
21 with regard to the contractual defenses of --
22 independent from the bankruptcy code. These are
23 ordinary contractual obligations -- the obligations
24 of good faith and fair dealing, which is written in
25 every contract; you just have to sprinkle lemon juice

1 on it to see its words, but it's there in every
2 contract in America. And we submit that again
3 because of the partnership that has now been formed
4 basically and as plan proponents, that WestLB share
5 somewhat in the conduct of Mr. Shoaf because they
6 honor it under this plan. And the same arguments are
7 made with regard to the state law arguments of
8 failure to mitigate.

9 We had a little exchange with
10 Mr. Robertson, and I'm not sure I'm precisely clear
11 on how that all shook out, but what is apparent is
12 that WestLB or a bad bank -- it's probably a bad
13 bank -- through its servicer, WestLB, proposes to
14 come out of this plan wearing two hats: Lender with
15 the notes and equity holder. Out in the world of --
16 out in the world outside bankruptcy merger of
17 interests is a principle that the -- which means that
18 WestLB walks away with everything. They get all the
19 marbles. In this case, we submit that under the
20 circumstances, that WestLB could have and should
21 have, and the law should deem that, that the
22 predicate to enforcement of the subordination
23 agreements have not been met because that treatment
24 constitutes the payment in full of the plan. That is
25 our legal position. We have submitted legal

1 authorities to the Court. We submit it without
2 further argument on the matter.

3 I have one additional point and then I'll
4 be pleased to sit down. And it has to do with the --
5 I'm taking the prerogative of ignoring the note he
6 just passed me.

7 THE COURT: Good. Thank you.

8 MR. WILSON: We all agree. It comes with
9 getting a little gray hair.

10 The final point really has to do with
11 procedural issues. The bankruptcy code, we just deal
12 with procedure all day, every day on matters. Number
13 one, it has been pointed out and will be again that
14 no greater than 50 percent of equity is -- appears in
15 this courtroom and objects. We all know where equity
16 fits in the world of bankruptcy. We always give it a
17 little piggy statement to my clients, and they get
18 numbered and the last little piggy is always equity
19 and that will never change. But the way this thing
20 has unfolded is very unusual and this has been rushed
21 at the Court real fast, and I'm not sure that, at
22 least in my experience, I have seen its equal where a
23 plan was proposed, a disclosure statement was
24 approved, a solicitation period was given and voting
25 was done. And then -- and then we got a different

1 plan and everybody likes to say it's really the same,
2 but it's materially different in significant ways.
3 At least two of the ways is that a million six in
4 claims just got jettisoned under the new plan, and a
5 principal of the debtor just got a promise of
6 \$720,000-plus out of the deal. Those are kind of
7 material.

8 The problem is that we have now rushed to
9 this, and we are confirming this on solicitations of
10 a different plan. Procured votes, procured on a
11 different plan under a different timeline, and then
12 all of a sudden we get this new plan, and I'm not
13 going to say eight days, but someone else might, on
14 this thing.

15 May I just submit one consideration?
16 Don't the body of creditors get to have a say? There
17 is \$720,000 new in this deal. We learned about it
18 when the plan supplement was filed, and then we all
19 just kind of scrambled and we've tried to respond to
20 it. But these votes are solicited and now we find
21 there are \$720,000 that could be -- that could go to
22 different creditors.

23 THE COURT: Well, why do you suggest that
24 the \$720,000 can go to other creditors, Mr. Wilson?

25 MR. WILSON: WestLB is willing to pay it

1 somehow.

2 THE COURT: Well, for services, aren't
3 they?

4 MR. WILSON: Well, services or whatever it
5 has to take to --

6 THE COURT: Well, one of the --

7 MR. WILSON: -- sell something you can't
8 sell.

9 THE COURT: There is no question that the
10 circumstances of this case are unique and unusual.

11 MR. WILSON: Oh, certainly.

12 THE COURT: And this is coming to the
13 Court very quickly. I guess the question that I have
14 for your clients is, other than the fact that you've
15 had to scramble and you object to the plan, is there
16 an articulable prejudice, a fundamental denial of due
17 process to your client if the Court makes a ruling?

18 MR. WILSON: Let me answer that as best I
19 can and very quickly. The Wickline interests are 38
20 and a half -- 38 and three-quarters percent. As
21 such, it's equity. And this is the reorganization
22 process and they're interested in the process and in
23 the payment and treatment of the claims. And those
24 who --

25 THE COURT: Well, how was equity treated

1 under the first plan?

2 MR. WILSON: I'm talking about -- I'm
3 trying to answer that. The answer is, equity has
4 been out of the running, I think, in all plans. But
5 I'll make my point and the Court can respond in its
6 ruling to it. And that is, the pecuniary interest --
7 I don't think there is any difference between plan
8 one and plan two as far as the equity. I'm talking
9 about the 38 and three-quarters percent. And we make
10 no claim for that and it would be foolish and naive
11 for to us do that. But when you're equity, that
12 doesn't mean that you cannot be concerned for the
13 outcome in the interest of everybody else. The -- it
14 is of vital interest that the process work, that the
15 plan that is presented to the Court be a plan that is
16 submitted in good faith and based on good faith
17 treatment and good faith conduct and that is a point.
18 I'm not talking about -- the only way the Wickline
19 interest would be entitled to participate in any way
20 beyond David's personal claim for \$4,600 -- and I
21 don't speak to that except in a very general way --
22 but the only way the Wickline interest would be able
23 to participate would be through the million six, and
24 of course that is a whole different set of arguments,
25 but that doesn't mean that the Wickline interests are

1 not vitally interested in the outcome of the case for
2 everybody. And that requires good faith --
3 bankruptcy good faith in terms of the submission of
4 the plan -- good faith treatment of the creditors and
5 we would submit that there is a -- sort of a
6 last-minute interjection of a \$720,000 component here
7 that the parties have not had an opportunity to fully
8 consider and comment upon, do discovery upon, and
9 vote upon. If this were a Chapter 13 case involving
10 an old car and a couple of credit cards and a couple
11 of medical bills and we had this kind of a notice
12 problem, we'd re-notice it.

13 I think that concludes our comments. The
14 Court has been very liberal with its time and
15 patience. Thank you, your Honor.

16 THE COURT: Thank you. Mr. Hofmann?

17
18 CLOSING ARGUMENT

19 BY MR. HOFMANN:

20 Thank you, your Honor. I would echo, and
21 hopefully without repeating too much of what
22 Mr. Wilson said with respect to the importance of
23 notice and opportunity to be heard on this matter.
24 Notice is the cornerstone of the bankruptcy code and
25 I think that due process has not been met in this

1 case.

2 THE COURT: So how has your client been
3 prejudiced, Mr. Hofmann?

4 MR. HOFMANN: The plan that was on file up
5 until -- I don't want to say days ago. I think it
6 was days ago last Friday -- did not provide for a
7 release of the claims against WestLB. This plan
8 does. The Court has had --

9 THE COURT: Well, it does. But
10 wouldn't -- the prejudice that I'm really focusing on
11 is, how has the shortened notice affected your
12 client's ability to address that issue?

13 MR. HOFMANN: How it's affected it is, had
14 there been -- a normal plan process that is
15 contemplated by the rules, it's 56 days. You see a
16 plan coming a mile and a half off. And 56 days ago,
17 had a plan been filed that says, "We are going to
18 release the committee's claims and the estate's
19 claims against WestLB, then my client would have had
20 a reasonable opportunity to explore and assess those
21 claims through Rule 2004 motions, through other
22 discovery procedures, and my client did not have that
23 opportunity.

24 The Court has observed my questioning of
25 the various witnesses, including Mr. Shoaf and

1 Mr. Robertson. And I did the best I could for my
2 client under the circumstances, but it has to be the
3 Court's clear observation that my questioning would
4 have been more effective had there been a reasonable
5 and normal amount of notice provided of these
6 proceedings, which there was not. I had no idea what
7 Mr. Shoaf or Mr. Robertson were going to say on the
8 stand here today. Given 56 days' notice, I think
9 there would have been quite possibly different
10 proceedings before the Court in the last two days of
11 this confirmation hearing.

12 In addition, your Honor, I would say that
13 myself and my firm have done the best we can under
14 these circumstances to read and understand the
15 various agreements that are being tossed about, but
16 the plan is changing on a daily basis. The plan was
17 modified today in significant respects. When the
18 Court heard counsel for WestLB state, "Well, these
19 are the additional modifications to the plan," that
20 did not even exist last week.

21 On the -- the confirmation hearing
22 obviously started last Friday. On Thursday night
23 late, as usual, there is a plan supplement filed that
24 materially changes the terms, and I'll throw out one
25 striking example and there are doubtless others. The

1 plan supplement that was filed last Thursday night
2 provided that WestLB's -- their commitment to fund
3 was no longer conditional. That, of course, benefits
4 the estate. But I prepared an objection on behalf of
5 my client based on the plan supplement that existed
6 just two days before. And by the way, just two days
7 before the objection deadline. So it's a moving
8 target, your Honor, and I'm doing the best for my
9 client to read these very, very, very voluminous
10 filings that the debtors made and reacting, but I
11 don't think it's been sufficient notice under the
12 circumstances. This is too important.

13 Now, can be no doubt that in the
14 appropriate case, this Court has the equitable power
15 to shorten notice as is necessary under the
16 circumstances. If this estate were a truck full of
17 rotting strawberries, there is no doubt this Court
18 could shorten the time and make sure those
19 strawberries were preserved for the benefit of
20 creditors before they go rotten. But I'd ask the
21 Court, what is the reason -- what is the reason we
22 are here on these emergency circumstances? And I
23 would submit that it's an emergency of WestLB's own
24 making. What WestLB has done is they have tightened
25 the spigot of cash on this debtor and this estate.

1 They said, "We are done funding this estate. Good
2 luck to you. You can take our way or the highway."
3 And guess what? The debtor took WestLB's way. I
4 don't think there can be any great surprise in that.

5 Your Honor, this plan is very different in
6 material respects from the plan that was filed and
7 submitted in February, together with the disclosure
8 statement that was approved on February 25th. That
9 plan had a couple more million dollars of funding
10 going into the estate. That plan did not have a
11 release of the committee's claims and the estate's
12 claims against WestLB. This plan has those two
13 things and also has the allowance of WestLB's claim
14 in a particular amount. These are all material, very
15 material aspects of the plan, your Honor. And if
16 they weren't material, then why are they being
17 proposed? They are needed -- the plan proponents
18 require these changes. Consider this by analogy. If
19 in February, that plan on file in February had been
20 approved by this Court, had been confirmed, and then
21 this different plan, and questionably a different
22 plan that is before the Court today had been
23 submitted as a modification of the plan, would the
24 Court require that there be a re-solicitation of the
25 votes that approved the February plan? Or would the

1 Court say, "Well, there is nothing materially
2 different in this plan. Therefore, I'm not going to
3 require a re-solicitation"? I think that that is
4 really the question before the Court this afternoon.

5 Your Honor, it's basic that a plan
6 proponent and a plan must be proposed in good faith,
7 and I don't think this one is. This plans provides
8 for a release of estate's claims against WestLB, and
9 this debtor is in bankruptcy court only because of
10 the wrongful acts of WestLB. And I would ask the
11 Court to contrast the evidence that it's heard
12 through WestLB and through Mr. Shoaf and through the
13 committee with what they said before back in February
14 and before. Look at the disclosure statement. Look
15 at how the debtor described WestLB's conduct at that
16 time. Look at the committees' Complaint against
17 WestLB. Compare that to the committee's position
18 today. I think one of those two positions are too
19 incongruous to mesh, and I think the explanation is
20 simple. WestLB destroyed this debtor's business,
21 forced this debtor into bankruptcy. The testimony of
22 WestLB's representative --

23 THE COURT: Well, Mr. Hofmann, isn't
24 another explanation the fact that complaints often
25 contain simple allegations that have to be proven?

1 MR. HOFMANN: There is no doubt about it.
2 There is no doubt about that. There are allegations
3 in the Complaint that, if proven, would lead one to
4 believe that there are substantial claims of this
5 estate against WestLB, and it's not just the debtor,
6 it's the committee that made even stronger
7 allegations.

8 THE COURT: Well, but they've made --
9 according to you, changed their position today and I
10 didn't quite gather, but I -- well, I don't know if
11 it was clear, but I thought you might be suggesting
12 that the committee was acting in bad faith.

13 MR. HOFMANN: I'm not suggesting that the
14 committee was acting in bad faith, and the committee
15 is not a plan proponent in any event. The debtor and
16 WestLB are.

17 THE COURT: All right.

18 MR. HOFMANN: Your Honor, I think there is
19 evidence that through the disclosure statement and
20 through the filed Complaint of the committee that the
21 estate has substantial claims against WestLB, and the
22 estate, through the committee -- the committee
23 purported to act on behalf of the estate, and I think
24 the committee had authority -- sought not only the
25 subordination of WestLB's claims, but the recovery of

1 the estate's claims against WestLB as a fraudulent
2 transfer. If that purpose were achieved, where would
3 we be? The estate would be free to pursue its claims
4 against WestLB, which would undoubtedly be very
5 substantial under the facts of this case.

6 Is there 100 percent likelihood of success
7 against WestLB? Certainly not. I would agree that
8 the facts are complicated here. But my client had a
9 chance, your Honor. My client had an opportunity to
10 recover, where now there -- if this plan is
11 confirmed, there will be no chance for equity
12 recovery.

13 THE COURT: Well, what opportunity would
14 your client have?

15 MR. HOFMANN: The opportunity would be
16 through the affirmative claims the estate would
17 recover against WestLB, which would become property
18 of the estate after the fraudulent transfer were
19 avoided as requested by the committee -- the pursuit
20 of those claims.

21 THE COURT: Well, how would those claims
22 ultimately result in any recovery down the line for
23 your client?

24 MR. HOFMANN: Well, first of all, it could
25 be that WestLB receives no recovery on account of its

1 claim because its claim, as I understand it, is a
2 breach of contract claim. To establish a breach of
3 contract claim, you have to establish that you,
4 yourself, didn't breach the contract. And I think
5 that the allegations read in the Complaint would
6 suggest that WestLB breached its contract and,
7 therefore, is not entitled to a breach of contract
8 claim against the estate.

9 With respect to the Bay North claim, which
10 is in the millions and millions of dollars,
11 evidently, I know there is also very active
12 litigation against Bay North. And is it assured that
13 Bay North will receive something? No, I don't think
14 so under the current litigation. So that is how my
15 client gets possibly something.

16 But, your Honor -- and this ties in very
17 closely obviously to the standing issue -- under
18 Section 1109 of the bankruptcy code, equity expressly
19 has standing. There is no question about it. The
20 only question is, who is equity? Is equity the 51
21 percent of equity represented by my client and
22 Mr. Wilson's client who is here telling you they do
23 not support the plan? Or is equity controlled by the
24 very proponents of the plan that would wipe them out?
25 I think that there are clear conflicts of interest at

1 work here, and I think the Court heard Mr. Shoaf
2 testify that he had not even considered the interests
3 of Mezzanine and Holdings in determining whether to
4 cast a ballot on behalf of them in support of the
5 plan. I think that is a breach of fiduciary duty.

6 Now, unquestionably, Mr. Shoaf has a duty
7 to act on behalf of the best interests of Easy Street
8 Partners. No question about it. The problem is that
9 that duty is fundamentally at variance with his duty
10 as -- on behalf of the equity holders downstream.
11 And under those circumstances, especially where you
12 have 51 percent of equity advising the Court they do
13 not support the plan, well, my question: How is this
14 debtor actually proposing this plan? How does the
15 authority exist to propose the plan? I think that is
16 a question that we're certainly not going to answer
17 today, but it raises questions as to the debtor's
18 good faith.

19 I don't believe this plan is proposed in
20 good faith. It's an effort to railroad through a
21 release of the estate's claims against WestLB. This
22 is the very company -- WestLB or the bad bank, one or
23 the other -- that through its own conduct is the
24 architect of the debtor's demise, and I think it
25 would be inequitable to approve a plan that releases

1 them and absolves the bad bank of its responsibility
2 for the failure of the debtor's business. Thank you.

3 MR. BLUMENTHAL: Your Honor, I have a few
4 brief comments.

5 THE COURT: All right.

6 MR. BLUMENTHAL: First of all, not to
7 belabor the point regarding PC I, Easy Street
8 Partners released WestLB under the cash collateral
9 stipulation in an order upon notice. PC I didn't
10 object then. All the plans on file provided that
11 they received nothing. They never objected. They
12 never called. They never said anything. The voting
13 issue is a red herring because they have always been
14 deemed to reject a plan. And, frankly -- which was
15 admitted even under the prior plans under the
16 stipulation between WestLB and the committee, if they
17 supported the plan, which, they've been on notice
18 forever, since it was filed, the -- they would
19 dismiss the Complaint and release.

20 And I would submit that Sky Lodge is not a
21 truck full of rotting strawberries but it is,
22 proverbially, a melting ice cube. This company, as
23 Mr. Shoaf testified, is running out of cash. If this
24 plan is not confirmed, that hotel will ultimately
25 shut down.

1 We do have exigent circumstances
2 confronting this debtor. Fourth of July weekend is
3 coming up -- a very big season, a very big time of
4 year. And so the -- and PC I was never entitled to
5 vote, so the modifications under the code only deal
6 with re-soliciting votes of those who were entitled
7 to vote. We haven't heard one complaint from any of
8 the creditors.

9 You know, I just want to address briefly,
10 your Honor, some of Mr. Wilson's statements. I would
11 really ask the Court just to consider what the
12 evidence is before you. There has been a lot of
13 throwing around the word "bad faith." Well,
14 Mr. Shoaf negotiated with the committee, the
15 unsecured creditors, Jacobson, WestLB. He dealt with
16 the homeowners. This is not Mr. Shoaf's plan, as
17 Mr. Wilson indicated. It's an amalgam of almost a
18 year of interaction and negotiation among all the
19 constituents in this case who were in the money. And
20 the fact that there is an subordination agreement
21 that contractually subordinates the claims of
22 Management and Development is a totally different
23 issue and has absolutely nothing to do with good
24 faith. And I think, your Honor, the -- and first --
25 second of all, the claims of Management and

1 Development are actually 2.8 million, including a
2 rejection of damage claim. So he is actually wrong
3 on the amount of the claims.

4 And I think, your Honor, actually in your
5 colloquy with Mr. Wilson is -- was correct.

6 Mr. Shoaf is not getting paid under the employment
7 agreement for anything in the past. He's getting
8 paid for services in the future by WestLB, not for
9 "whatever," which was the word that Kim Wilson used,
10 but for his services going forward. The only
11 evidence is that his continued employment is
12 necessary for the continued feasibility of the
13 reorganized debtor. He has become, in essence, the
14 centerpiece of the Sky Lodge Hotel. If he was just
15 to be discarded, frankly, this reorganized debtor
16 would have a very difficult time to struggle through
17 the next couple of years. It would be a loss of
18 continuity. And by the way, I'm sure if Mr. Wickline
19 brought in people who could buy the unsold units, he
20 could negotiate finder's fees with WestLB if he
21 actually did some work for a change. And, again,
22 everyone is complaining about -- it sounds like when
23 my kids were two-year-olds, frankly. What I used to
24 tell them, frankly, is, "Don't stamp your feet unless
25 you have something to really stamp your feet about."

1 I call it sort of this is like a crybaby
2 objection. It's sort of like, "I'm not getting
3 anything, so no one should get anything." That is
4 basically their objection. It's sort of sour grapes,
5 et cetera. No one is -- and this plan, if there was
6 ever a plan that was proposed in good faith, that
7 is -- that is this particular plan. There was no
8 shifting or transferring of liquor licenses. You can
9 not transfer liquor licenses. That was never an
10 asset of the estate. There was only evidence of one
11 liquor license. But, again, it would not have made
12 one iota of difference where the liquor licenses
13 stayed because they would need to be turned in. And,
14 frankly, if they were still in management, those
15 liquor licenses would be over upon the signing of a
16 confirmation order, which, in essence, rejects those
17 agreements. So I would submit to the Court that all
18 the -- the two objections, again, are misplaced,
19 shallow. Not one support of evidence for their cries
20 of bad faith. This plan, and the evidence supports,
21 was proposed in good faith and we ask that you
22 confirm the plan.

23 MR. HAVEL: Just a few supplementary
24 comments, your Honor. Regarding the arguments by
25 Mr. Wilson for Wickline, I would just make two

1 observations and arguments. First is, I had in my
2 opening comment said, there was absolutely no
3 evidence submitted by Wickline to support the kind of
4 general arguments they made in their objection
5 papers. Mr. Wilson, in his argument at closing,
6 reinforces that there is no evidence, and instead
7 asks your Honor to take wholly speculative,
8 unjustified, and quite frankly, not supported by the
9 law, leaps to find some sort of support for his
10 argument. And there is only two, and I'll focus on
11 them quickly.

12 First, he repeats the allegations about
13 the liquor license movement being a conduct that
14 harms Mr. Wickline and his ownership of Management
15 and that then, therefore, transfers over to a bad
16 faith proposal of the entire plan because Mr. Shoaf
17 is getting some benefit. That itself is clearly a
18 very disputed and murky area, and I don't think there
19 has been any competent evidence by Wickline to show
20 that that is, in fact, the case.

21 But then Mr. Wilson asked your Honor to
22 take a wholly unjustified and unsupportable leap,
23 which is because we are a co-plan proponent, we
24 automatically share the taint of that bad faith and
25 it is our bad faith as well, which is not the case.

1 We have through the record and the facts shown that
2 this has been an arm's-length extensive negotiations
3 and that these plan terms have been developed over a
4 fair amount of time with a lot of give and take.

5 Secondly, there was this attempt to
6 confuse or ignore the fact that the new hard money
7 equity is being put in by a WestLB affiliate or
8 related entity and that the restructure of its debt
9 is a separate and important step in the plan, but
10 separate. And Mr. Wilson then again suggested to
11 your Honor, well, they are both kind of going to be
12 in this family, and we all know that when things are
13 in a family, there is a merger of interests. Well,
14 quite frankly, that is exactly the wrong statement.
15 We all know that if there are two entities in an
16 affiliated relationship, as long as they are separate
17 entities and treated as such, there is no merger. A
18 merger is an extraordinary remedy that you have to
19 get to by showing facts. And so, again, he asked
20 your Honor to take a leap which he doesn't put in the
21 record and to take a leap that is not supported by
22 the facts that are before you. Again, this all
23 supports the fact that there is just no basis for
24 these allegations in the Wickline objections.

25 As to the responses by Park City I, just a

1 couple of factual things. WestLB has not, quote,
2 "tightened the spigot" and shut this business down.
3 If the attorney for Park City I knew the facts a
4 little more carefully, he would know that there has
5 always been 3.2 million of cash collateral. There
6 has been a standing budget for office expenses. And
7 the only cry WestLB has been making, and it's been
8 since March, is, "Let's get this case over because
9 the money is getting lower and lower." We have come
10 in and three or four times suggested we are running
11 out of money. We are not tightening the spigot. We
12 don't control the budget. We have not stopped
13 providing money for the budget. And so to suggest we
14 are creating the crisis is wrong. We've try to avert
15 the crisis instead of create it.

16 The other comment about the closing
17 argument by Mr. Hofmann, I think he finally did
18 acknowledge what is going on here for his client when
19 he said something to the effect of, "Well, we just
20 want possibly something. This is possibly our last
21 hope for something."

22 Well, what he is really telling your Honor
23 is that he is out of the money. He wants to
24 speculate with other people's monies and other
25 people's rights to try and exploit a very difficult

1 and a very speculative lawsuit with the hopes that
2 maybe something would flow up to him. Well, he is
3 not the party who has to make the hard decision about
4 whether to spend the money of the estate or get more
5 money for the estate and take the chance that it's
6 going to be successful. So his protestations are
7 like the businessman who is already out of money and
8 says, "Well, I guess I'll go to Vegas and roll the
9 dice. Now, I'm using the bank's or I'm using the
10 creditor's money to do that, but I guess that's
11 okay."

12 That is what they are doing here by asking
13 you to give any credence to their argument that these
14 lawsuits have to be preserved for their benefit, when
15 the people who really have an interest in the
16 potential benefit of these lawsuits have agreed to
17 dismiss them in a settlement as part of a plan that
18 is very fair and may even be very generous.

19 THE COURT: Thank you. The Court will
20 take a brief recess.

21 THE BAILIFF: All rise.

22 (Recess from 3:25 until 4:23 p.m.)

23 THE BAILIFF: All rise. Court resumes in
24 session. Please be seated.

25

RULING OF THE COURT

THE COURT: This case is before the Court on unusual circumstances and shortened notice in an expedited hearing. The objecting parties argue that this an indication of bad faith and strong-arm tactics by WestLB. Given the history of this case, these circumstances can just as easily be construed as an indication of good faith. The plan that is before the Court is a collaborative effort between the debtor, WestLB, the unsecured creditors committee, Jacobson, and fractional unit owners, who all support the plan. The objecting parties are either, one, parties who hold an equity interest but not a direct equity interest in the debtor. These parties have no right to vote on the plan, which right to vote is held by Easy Street Mezzanine and, therefore, these parties have no standing.

The Court will hereafter refer to these parties as the equity objectors.

The second party -- parties objecting to the confirmation in the hearing are parties who have an equity interest in unsecured creditors who are insiders and subject to an express subrogation agreement. I will refer to these parties as objecting creditors.

1 The objecting parties argue that this
2 expedited procedure has deprived them of due process.
3 Because the equity objectors do not have standing
4 with respect to voting in this plan, there is no
5 denial of due process since they have no right to be
6 heard. The objecting creditors, as the Court stated,
7 are subject to an express subrogation agreement.
8 Their claims under the amended plan were effectively
9 subrogated to WestLB and unsecured creditors and
10 under the current plan, their claims are expressly
11 subrogated. Subrogation agreements are enforceable
12 in bankruptcy cases and the subrogation agreement is
13 presumptively valid. Other than vague assertions
14 that the agreement is unenforceable, the Court has no
15 credible evidence that gives rise to any defenses
16 with respect to the subrogation agreements.

17 The creditor objectors, the parties to the
18 subrogation agreement, is aware of the subrogation
19 agreements and the Court finds that there is no
20 denial of due process to the objecting creditors with
21 respect to this expedited hearing.

22 Objecting equity -- or the equity
23 objectors, although without standing, argue that the
24 litigation against WestLB may result in recovery on
25 their part. This is not so. The debtor waived

1 claims against the debtor in its initial -- in the
2 initial cash collateral hearing, which this Court
3 approved. At that time, the release of claims was
4 addressed by the Court. There were no objections to
5 the release of claims by the debtor against WestLB,
6 and as such, the release was approved.

7 The plan is not releasing claims of the
8 debtor or the estate. The claim being settled is the
9 claim of the committee, and although the committee
10 claim asserts an avoidance action, that claim was
11 waived. The only claim the committee has is limited
12 to subrogation. Consequently, there would be no
13 recovery passing on to equity because of that
14 litigation.

15 Because this is not a claim of the debtor
16 or the estate that is being compromised or doesn't
17 believe that it's subject to what are commonly
18 referred to as the Copexa factors, but nevertheless,
19 the committee has presented the Court with evidence
20 of the Copexa factors, which would be applicable to
21 the settlement in this case.

22 The objecting parties also assert that the
23 plan is not proposed in good faith. The arguments
24 that the plan is proposed in bad faith or without
25 good faith concentrate on either of compensation to

1 Mr. Shoaf or the actions of WestLB that have been
2 characterized as strong-armed tactics. The Court
3 notes from the history and background of this case
4 that WestLB did not precipitate the filing of this
5 case. The emergency giving rise to these unusual
6 circumstances has not been precipitated by WestLB
7 other than WestLB's indulgence of the debtor's
8 efforts to obtain alternative financing. Evidence
9 before the Court is that the debtor was unable to
10 find any alternative financing and, hence, the only
11 alternative for reorganization was for WestLB to
12 participate as an alternative financier.

13 Compensation to Mr. Shoaf is for future
14 services. Although the suggestion is that this
15 compensation is excessive, there has been no evidence
16 that the compensation is, in fact, excessive, that it
17 is out of line with previous compensation or that the
18 compensation adversely impacts creditors. Any claims
19 that Mr. Wickline or his related or controlled
20 entities may have against Mr. Shoaf are not
21 compromised under this plan. If Mr. Wickline
22 believes there has been a breach of fiduciary duty
23 with respect to him, he is at liberty to pursue those
24 actions. But a plan proposing to pay creditors,
25 which is supported by creditors, is not filed in bad

1 faith or proposed in bad faith simply because
2 management or future management is compensated in an
3 amount that is excessive in the view of an adverse
4 party. What we have before the Court is a plan that
5 has been worked out by the parties who have a
6 financial stake in the outcome and all have
7 compromised.

8 The property of the estate is valued at
9 \$20,600,000. The secured claim of WestLB is
10 approximately \$17,900,000. The secured claim of
11 Jacobson Construction is approximately \$1,700,000.
12 Administrative and priority expenses exceed one
13 million dollars and unsecured claims are
14 approximately one million dollars.

15 These are the parties who have a financial
16 stake in the outcome of this case, and they have all
17 voted to accept the plan. The plan is facilitated by
18 WestLB contributing additional capital in exchange
19 for equity. Based on all of the circumstances and
20 the evidence presented to the Court, the objection of
21 Park City I and of Mr. Wickline and his related
22 entities are overruled. The Court finds that the
23 debtor has met -- the debtor and WestLB have met the
24 requirements of the bankruptcy code for confirmation
25 and the plan will be confirmed.

1 Mr. Blumenthal and Mr. Cannon, you may
2 prepare proposed findings of fact and conclusions of
3 law consistent with the Court's ruling.

4 MR. CANNON: Thank you, your Honor, and I
5 raise this only because I am very prone to do this;
6 the Court referred a number of times to a subrogation
7 agreement, and I think the Court meant subordination
8 agreement.

9 THE COURT: The Court did mean
10 subordination agreement. So I apologize for that.

11 The remaining matters before the Court, I
12 believe, are all applications for compensation.
13 Other than the application of the Wrona Law firm, the
14 Court is unaware of any objections to compensation
15 that have been filed. Are there are objections that
16 have been filed?

17 MR. CANNON: Your Honor, there are
18 objections to the applications of Mr. Wrona and
19 Mr. Gordon. There are no objections -- there is a
20 reservations of rights, I believe, with respect to
21 all the applications. There are objections filed by
22 Gateway to Mr. Wrona's and Mr. Gordon's applications
23 which have been joined in by the committee on a
24 limited basis and maybe there weren't any on an
25 unlimited basis.

1 THE COURT: All right. Well, with respect
2 to the applications of -- the application of the
3 Wrona Law Firm, if I understand it, the objection is
4 that the Wrona Law Firm represented Mr. Shoaf at the
5 same time that he was representing the debtor; is
6 that correct? Mr. Wrona, if you want to --

7 MR. WRONA: Thank you, your Honor. What
8 happened in March, one of my roles as special counsel
9 for the debtor is to handle media relations. There
10 was a lawsuit filed and I was asked on behalf of the
11 debtor to take a look at the lawsuit. We thought
12 that there was going to be a story in the Park
13 Record. As I got involved, then the debtor asked me
14 to basically increase my involvement and asked me to
15 determine if we could obtain some kind of extension
16 because we were coming up on the last sweet spot of
17 the season for the project, which is spring break.

18 I contacted Gateway Center and asked if I
19 could obtain an extension, and quite admittedly, I
20 said, "Look, Mr. Shoaf and Cloud 9 would like me to
21 get this extension." They agreed to that extension.

22 They then contacted me three days later
23 and said, "Look, we're willing to enter into a stay
24 of the state court action." They prepared the stay,
25 and I signed it on behalf of Mr. Shoaf and Cloud 9.

1 So I think it is fair to say on those
2 couple acts, I was asked by the debtor to undertake
3 those acts, but I was engaging in representation of
4 both Mr. Shoaf and Cloud 9 and the debtor. And so,
5 you know, to the extent there was a violation of the
6 speed limit, if you will, your Honor, I hope the
7 Court views it as going a couple of miles an hour
8 over the speed limit.

9 THE COURT: Well, if I were to view it as
10 miles over the speed limit, how many miles -- in
11 other words, how many dollars did you devote to --

12 MR. WRONA: I submitted something to the
13 court -- and I was -- I erred really on the side of
14 Gateway. My actual involvement on behalf of
15 Mr. Shoaf was probably less than hour, but I looked
16 at my billing records and what I reported to the
17 court was two and a half hours of time, which is
18 \$875.

19 THE COURT: And when did that occur?

20 MR. WRONA: Looking at my billing records,
21 the -- I guess the critical acts, one I think was
22 April 5th, if I'm not mistaken, and that is when I
23 reached out to Gateway and asked for the extension.
24 Then on April the 8th was when I engaged in a
25 telephone conversation with a Gateway attorney and

1 they suggested the stay. Then on April the 13th,
2 Gateway sent me the stipulation and the letter asking
3 me to sign it.

4 It's interesting, they are objecting to
5 the fee and it was Gateway that was actually
6 requesting that I sign the stay and I did that.

7 So that April 13th entry, it looks like
8 two-tenths of an hour. The April 8th entry is
9 six-tenths of an hour, and I didn't even charge
10 actually for the April 5th email that I sent because
11 it was a matter of minutes.

12 THE COURT: All right. So the -- I'm
13 sorry -- you don't happen to know the docket number
14 on your application, do you?

15 MR. WRONA: Judge, I don't know if I have
16 that in front of me. I had it here on Friday.

17 THE COURT: Oh, here, I found it. So you
18 are seeking -- total compensation being requested is
19 34,715?

20 MR. WRONA: Correct. And a lot of that
21 money -- a lot of those fees were generated quite
22 some time ago because obviously my firm has never
23 been fully compensated really going back to, I think,
24 last fall. Yeah, I think it's \$34,718, if I'm not
25 mistaken -- \$34,717.50.

1 THE COURT: Well, it -- unfortunately,
2 Mr. Wrona, it's a little more than just going over
3 the speed limit. I mean, the Court has a long
4 history and a pretty consistent and clear case law
5 that the counsel for the debtor cannot at the same
6 time represent principals of the debtor. Now, in
7 this case, you were employed as special counsel?

8 MR. WRONA: That's correct. I'm an alien
9 to bankruptcy court. That was part of the problem.

10 THE COURT: Well, that is no excuse,
11 Mr. Wrona.

12 MR. WRONA: Understood.

13 THE COURT: I think it does allow the
14 Court some leniency if you are acting as special
15 counsel as opposed to general counsel. So I'm going
16 to -- let me hear from Mr. Payne and see what amount
17 he believes was at issue.

18 MR. PAYNE: Thank you, Judge. Your Honor,
19 Doug Payne for Gateway Center, LC. I think that the
20 fee application of Mr. Wrona indicates that on March
21 15th he spent one half an hour reviewing the copy of
22 the state law complaint, correspondence with Bill,
23 presumably Shoaf, on the same, a telephone conference
24 with Mr. Shoaf on how it impacts members of Easy
25 Street. And then in paragraph -- that is paragraph

1 nine that goes on March 24th, there is time entries
2 on March 29, April 8th -- that is a telephone
3 conference with Mr. Crocket of my office about the
4 state court lawsuit. And then paragraphs 12 and 13,
5 there are other time entries that total 4.4 hours,
6 your Honor.

7 But what is troubling about this is that
8 this lawsuit was not against the debtor, your Honor.
9 It was against Cloud 9 Resorts, LLC, which I think is
10 an insider of the debtor and against Mr. Shoaf,
11 individually. It was on their obligations under a
12 lease as the original obligator, lessee, Cloud 9
13 Resorts, LLC and Mr. Shoaf as guarantor. And by this
14 time, the debtor had rejected the lease. Not only
15 was the debtor not a party, the debtor had rejected
16 the lease in January when the debtor failed to assume
17 or reject the lien within the 120 days. So I don't
18 know that it's appropriate for the bankruptcy estate
19 to be billed for advising the debtor -- for someone
20 advising the debtor about how a lawsuit impacts
21 members of the debtors or potential disputes between
22 members, which is what some of these time entries
23 indicate. On April 21st, telephone conference on
24 Gateway litigation, Bay North and other issues.
25 April 20th, working on how to keep Easy Street

1 members out of Gateway litigation.

2 I just don't think that is an appropriate
3 use of the debtor's funds, and I think it indicates
4 that Mr. Wrona was not disinterested. And I don't
5 think that that should be allowed, and that would
6 total 4.4 hours, but I think there is a question:
7 Did he lose his disinterested status?

8 THE COURT: Well, and I think that because
9 he's special counsel, it does allow me a little more
10 leniency because he doesn't have the same pervasive
11 disinterested requirements. And so what I'm going to
12 do is I will approve fees except for those that are
13 detailed in Mr. Payne's objection and those fees will
14 be disallowed.

15 And I guess we have Mr. Gordon's?

16 MR. GORDON: Yes, your Honor. Your Honor,
17 what occurred in my case, I was approached in the
18 spring of last year and asked to represent the Sky
19 Lodge in its dispute with the Gateway Center and the
20 lease. In the initial phases of that, it was
21 indicated that the client was Cloud 9 Resorts, which
22 I understood to be the managing entity of the Sky
23 Lodge. Three or four months later, I was told that
24 the Sky Lodge was declaring bankruptcy and was asked
25 to continue in acting as counsel for the Sky Lodge

1 and represent it in the bankruptcy. And so I was
2 appointed as special counsel for that one limited
3 purpose and continued forward in representing the
4 interests of Easy Street Partners.

5 It was not until March 15th that in an
6 attempt of service of the Complaint mentioned, that
7 Mr. Wrona took care of, wherein there was service
8 upon Bill Shoaf and Cloud 9 Resorts, and Gateway
9 wanted me to accept service to that. At that time, I
10 looked closely at that and did not understand -- I
11 understood that Easy Street and Cloud 9 were the
12 managerial entities involved. I recognized that
13 there was not a conflict of interest as to the lease.
14 The factual allegations between Easy Street Partners
15 and Gateway, and Cloud 9 and Gateway were identical.
16 The only issue would be that if, in fact, Bill Shoaf
17 or Cloud 9 lost in their state claim, there was the
18 potential for a contribution claim back against Easy
19 Street Partners. So at that point, I did what I
20 would normally do in a civil case when I recognized
21 that there was a possibility of a conflict. I got a
22 consent waiver, talked to my clients, and then moved
23 forward.

24 A formal objection to my fee application
25 did not come until April 23rd, which was just two

1 days before we actually held the two-day evidentiary
2 hearing before your Honor on the issue of whether the
3 Gateway lease was legitimate or not, and so did I not
4 have time to address it at that time. Once we got
5 through the evidentiary hearing, I spoke with Ken
6 Canyon, who has helped me tremendously through the
7 ins and outs of bankruptcy law, and he indicated to
8 me that I needed to file a supplemental disclosure,
9 which I did at that time, explaining the situation.

10 I would like to point out to the Court
11 that every ounce of work -- really, the question for
12 the Court is this: Had Partners prevailed in its
13 objection to Gateway's claim, would it have benefited
14 the bankruptcy estate? And the answer is absolutely
15 yes. Gateway's claim was for \$113,000 and Partners
16 was primarily liable on the lease for that amount.

17 As seen in the evidentiary hearing on this
18 matter, Partners felt strongly that the lease had
19 been violated and that it owed nothing to Gateway,
20 and prevailing on the objection would have done away
21 with a large claim that would have freed up capital
22 to pay other creditors.

23 THE COURT: All right. Mr. Payne,
24 wasn't -- I guess the question I have is, is there
25 work that was done for Cloud 9 or Bill Shoaf that

1 would not have been done in objecting -- in
2 representing the estate in this matter? I mean,
3 Mr. Gordon was employed specifically for this reason,
4 and the fact that Mr. Shoaf and Cloud 9 might have
5 been liable on the lease as well, I don't know that
6 that should disqualify Mr. Gordon.

7 MR. PAYNE: Well, your Honor, that was not
8 disclosed, and certainly the attach -- one of the
9 attachments to our objection was Mr. Gordon saying he
10 represented Cloud 9 Resorts, LC. Certainly he knew
11 that was a separate entity that had liability or
12 responsibility under the lease prior to accepting his
13 engagement as special counsel.

14 And I think that the question before the
15 Court is: Was he -- did he hold an interest -- or
16 hold or represent an interest adverse to the debtor
17 or the estate on the matter of which he was employed?
18 And I think the answer to that is yes because he had
19 represented Cloud 9 --

20 THE COURT: Why would his interest be
21 adverse?

22 MR. PAYNE: Well, there would be claims
23 for contribution, plus, your Honor, I don't think
24 it's necessarily --

25 THE COURT: Well, but he didn't represent

1 them in those claims, right?

2 MR. PAYNE: Not during the bankruptcy, I
3 guess. But I guess the question is: Would the
4 interests of Mr. Shoaf and Cloud 9, were they
5 congruous with the interests of the estate? I don't
6 think they were completely, your Honor. For example,
7 it was probably in the interest of the guarantor,
8 Mr. Shoaf, and the initial lessee under the lease for
9 the debtor not to -- not to quickly reject the lease
10 so that the debtor's obligations under the
11 administrative claim would pay for, perhaps, four
12 months of rent under lease. And, in fact, that is
13 what happened here. It may have been in the best
14 interest of the estate for that to be quickly
15 rejected. In fact, the debtor didn't intend to use
16 the space, which is what the debtor has represented.
17 But, in fact, that went for the entire 120 days and
18 was rejected as a matter of law. If, of course, that
19 is paid from the bankruptcy estate as an
20 administrative claim, that would reduce the exposure
21 of Mr. Shoaf and of Cloud 9 Resorts.

22 And Mr. Gordon was engaged specifically to
23 deal with the lease and the debtor took no action to
24 reject the lease. They said the debtor tried to
25 litigate it on the merits of the lease, claiming

1 there was some type of constructive eviction. So I
2 don't think that the interest of the estate and of
3 the other obligated parties that were -- parties who
4 were obligated to the Gateway Center were congruous,
5 your Honor. I think there is an adverse interest,
6 and I don't think that he's entitled to be
7 compensated.

8 THE COURT: Well, I guess the question I
9 have is, if it's not congruous, does that mean that
10 it's not disinterested, I guess?

11 MR. PAYNE: I think it's adverse. If
12 there is a differentiation between --

13 THE COURT: Yeah.

14 MR. PAYNE: That would be my
15 interpretation and argument.

16 THE COURT: Well, I don't know that the --
17 I think on the matter that Mr. Gordon was employed,
18 what he did was within the scope of his employment.
19 I understand your argument that there might be some
20 benefit for the debtor to occupy the premises. But
21 under the circumstances, I'm going to find that
22 Mr. Gordon, as special counsel, was not -- did not
23 have an adverse interest on the matter for which he
24 was employed and I'll allow the fees.

25 With respect to all the other fees, with

1 the reservation of rights that WestLB has requested,
2 the fees will be allowed.

3 MR. CANNON: Thank you, your Honor. This
4 is one matter with respect to the order, and I don't
5 want into Judge Boulden's celebration of her time on
6 the bench.

7 We have an order prepared. We're going to
8 revise it based on the Court's ruling today. We
9 anticipate being prepared to circulate it and file it
10 tomorrow. The only concern the debtor has is that
11 there is a -- the funding commitment deadline request
12 is Friday, July 2nd. I hope that if it were
13 necessary, it could be extended, but I don't know
14 that. And so what we would like to do is try to find
15 a way to get the order reviewed and entered by
16 Friday.

17 THE COURT: Well, Local Rule 9021 states,
18 "Unless otherwise provided herein or directed by the
19 Court," so I'm going to waive the requirements of
20 Rule 9021 as far as approval by counsel.

21 MR. CANNON: Thank you, your Honor. We'll
22 submit it by midday tomorrow.

23 THE COURT: Fine. So I guess if the
24 parties will -- if you will be sure to give all
25 parties electronic notice, Mr. Cannon, so that,

1 knowing that I've waived the requirements of the
2 rule, if anybody does have an objection, they will
3 need to promptly file the objection.

4 MR. WILSON: Mr. Hofmann and I will be in
5 this courtroom at noon and if you --

6 THE COURT: So alert your staff.

7 MR. WILSON: Meet midday or drop us off a
8 copy here, would you?

9 MR. CANNON: We'll bring a copy down here.

10 MR. WILSON: Awesome. Thank you.

11 THE COURT: All right. Thank you,
12 everyone. Court is in recess.

13 THE BAILIFF: All arise.

14 (The hearing concluded at 4:52 p.m.)
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